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POSITIVE LAW AND OTHER LAWS :

A COMPARISON AND CONTRAST.

I.

JURISPRUDENCE of the English or analytical type is directly conversant only with the law of the lawyer and of the tribunal, or with what is generally, though not very happily, styled positive law.¹ A positive law is a command of the sovereign power of the state, formulated and administered by the government of the state, prescribing a course of conduct to one or more subjects of the state.

Assuming the correctness of this definition, I proceed to draw a short comparison and contrast between positive law and other kinds of law. This double process should result in a better apprehension of positive law and prove a safeguard against that mingling of it with certain of its congeners which has always been a serious obstacle to clear thinking on subjects pertaining to legal science. The effects of such confusion can be readily seen in most of the definitions of law formulated by philosophizing jurists from Cicero downward. In the main, these definitions are worse than profitless — a “Serbonian bog,” where the mind sinks in a mixture of rhetorical flourish, dogmatic theology, moral thesis and political theory.² Few who have seriously tried to bring a distinct conception out of this chaos will find it in their hearts to

¹ In this connection, “positive” means existing by position, *i. e.*, set by “the will of a legislator” (Kant, *Phil. of Law*, trans. by Hastie, p. 55), or “by the will of those that have had the sovereign power” (Hobbes, *Leviathan*, Morley’s Univ. Lib., ch. xxvi, p. 132). “Authoritatively imposed.”—Holland, *Jurisprudence* (1st ed.), p. 35. To the idea of position, Austin adds that of human, as distinguished from divine, position.—*Jurisprudence*, vol. i, pp. 85, 175. “This arbitrary use of the word has, perhaps, become technical with jurists.”—Clark, *Practical Jurisprudence*, p. 135.

² For a collection of these definitions, see Holland, *Jurisprudence* (1st ed.), pp. 17, 18 ; Clark, *Practical Jurisprudence*, pt. 1, ch. viii.

censure Austin, as Professor Pollock has done, for filling "six lectures with a discussion of what positive law is *not*." ¹

II.

"Between the laws of nature and the laws of the Queen," says Hearn, "there is no resemblance and no means of comparison." They "are related in the same manner and to the same extent as in Latin *jus*, meaning law, is related to *jus*, meaning sauce." ² If this statement were quite accurate, Ulpian could scarcely have made the blunder of attributing to *jus naturale* (mentioned as one of the three divisions of private law ³) the instinctive actions manifested by the lower animals, as well as by mankind, in their sexual unions and the rearing of their offspring. ⁴ Doubtless this singular aberration of his would have been impossible but for the fact that the idea of a law of political society and the idea of a law of nature both contain the element of uniformity of occurrence. Positive laws are propositions expressing certain uniformities of conduct — courses of conduct — to be observed by human beings : and laws of nature are propositions expressing uniformities of the coexistence of things or succession of events in nature. "Wherever we can detect uniformities or similarities," remarks Jevons, "we so far create a science and arrive at natural laws." ⁵

But, excepting this single point of coincidence, positive laws and the laws of nature are totally disparate. Positive laws are commands. "Natural laws, on the other hand, are not commands, but assertions respecting the invariable order of nature." ⁶ They cannot be cast in an imperative mold, because they are only our way of stating as much as we have made out of the order of the universe.

¹ Essays in Jurisprudence and Ethics, p. 2.

² Legal Duties and Rights, pp. 8, 9.

³ *Collectum est enim ex naturalibus praeceptis aut gentium aut civilibus.* Just. Inst., I, I, 4.

⁴ *Jus naturale est, quod natura omnia animalia docuit, etc.* See Ulpian, Dig., I, I, I, 3 ; Just. Inst., I, 2, pr.

⁵ Lessons in Logic, pp. 1, 2.

⁶ Huxley, Science Primers: Introductory. Pollock, Essays in Jurisprudence and Ethics, ch. ii.

III.

The laws of art or of practice are formulas denoting uniformities of conduct that constitute the means necessary to the production of proposed ends.¹ The faculty of reason, perceiving the causal relation existing between the conduct and the ends conditioned upon it, is naturally represented as enjoining it upon all those who adopt the ends, under penalty of total or partial failure in case of non-observance. This accounts for the fact that art always expresses itself "in the imperative mood, or in periphrases equivalent to it."²

Nevertheless, it is plain that the laws of art are not really commands. Since a command requires at least two parties, a superior and an inferior, there is obviously a wide divergence from literal phraseology when one's reason is said to command him to follow the means necessary to a chosen end. Nor does the inevitable defeat caused by a departure from the laws of art³ possess the character of the sanction that every true command implies: for the defeat is an evil that comes simply in the ordinary course of nature, while the sanction is an evil inflicted directly or indirectly by a superior in consequence of disobedience to his will.

IV.

When not regarded as expressive of divine legislation,⁴ the laws of hedonistic or utilitarian systems of ethics, like the laws of art, are rules of conduct for the realization of an end. This end, according to the egoistic form of theory, is personal happiness or well-being. According to the universalistic form of theory, it is general happiness or well-being.⁵ Thus Herbert

¹ See Mill, *Logic*, bk. vi, chap. xi, § 2.

² *Ib.*, *id.* § 1.

³ Bentham terms this a "physical sanction" (*Prin. of Morals, etc.*, chap. iii, §§ 3, 8) and is justly criticised by Austin (*Juris.*, pp. 217-219).

⁴ The rules of utilitarian ethics are thus treated by Paley (*Prin. of Moral and Pol. Phil.*) and Austin (*Juris.*, pp. 106-170). See Sidgwick, *Hist. of Ethics*, pp. 238, 245.

⁵ Sidgwick, *Methods of Ethics* (1st ed.), chap. i.

Spencer, who is a universalistic utilitarian, explains that moral laws are the "deductions" that science draws "from the laws of life and the conditions of existence," respecting "what kinds of actions necessarily tend to produce happiness."¹ And Hobbes, an egoistic hedonist, asserts that the "laws" of moral philosophy are improperly so called, because they are but theorems or conclusions "concerning what conduceth to the conservation and defense" of mankind.² Only in a single particular is there any divergence in form between laws of art and the laws of utilitarian ethics. While the ends to which the laws of art are directed may be freely chosen or rejected, the end to which the laws of utilitarian ethics point out the means, must, by virtue of a psychological necessity, be adopted by every man.³

No school [says Spencer] can avoid taking for the ultimate moral aim a desirable state of feeling called by whatever name — gratification, enjoyment, happiness. Pleasure somewhere, at some time, to some being or beings, is an inexpugnable element of the conception.⁴

If, now, care be taken to look at the kind of ethical laws described above, as in themselves they really are, — if the formal characters of political and social laws be not falsely attributed to them, — it will be seen that they are merely prescriptions of reason, prudential maxims,⁵ not commands, and that, consequently, they are as devoid of sanction⁶ in the strict sense as the laws of hygiene or navigation or any other art.

Of quite another aspect are the laws of transcendental or intuitional ethics. These are generally presented as absolute⁷ rules of human action, delivered authoritatively and with a

¹ Data of Ethics, chap. iv, § 21, p. 57.

² Leviathan (Morley's Univ. Lib.), chap. xv, p. 78.

³ Sidgwick, Methods of Ethics (1st ed.), pp. 24, 26, Bentham, Prin. of Morals, *etc.*, chap. 1, §§ 11, 13; Ward, Dynamic Sociology, vol. ii, pp. 111-157.

⁴ Data of Ethics, chap. iii, § 15, p. 46.

⁵ Kant, Phil. of Law (trans. by Hastie), pp. 16-17.

⁶ "Any conditional evil annexed to a law [command] to produce obedience to it." Austin, Juris., p. 523.

⁷ "Absolute," *i.e.*, "not conditioned on our knowledge of the end and of its connection with the actions prescribed." Sidgwick, Methods of Ethics (1st ed.), p. 3; Kant, Phil. of Law (Hastie's trans.), p. 17.

measure of constraining force¹ by a power of intelligence² denominated "conscience," "principle of reflection," "moral faculty," "practical reason," *etc.*

The juridical terms invariably employed in describing the laws of intuitional ethics tend somewhat to confuse; still there can be little difficulty in discerning that, unless they are conceived to be rules prescribed by God through moral consciousness, they are commands only by metaphor. For, in the first place, there is no commander distinct from the commandee, to whom these laws can be referred. The "autonomy of human nature" means simply that man discovers in consciousness a rule of life, that his nature or his "whole normal nature" is "a law unto himself," not that he *commands* a law unto himself.³ Furthermore, commands always spring from some-one's desire⁴ for their performance. But a prominent characteristic of the rules of intuitional ethics is, that they are revealed independently of such desire and by a necessary operation of the moral constitution.⁵

In its origin [says Lorimer, ethical] law, like existence, is thus *involuntary* and inexplicable. It is an objective phenomenon which consciousness presents to us not from without, but from within; a conception which is imposed on our cognitive faculties *a priori*; a postulate necessitated by the fact that we are.⁶

It would seem, then, that already we have gone far enough to make plain that, save in the light of an adventitious theistic hypothesis,⁷ the laws of intuitional ethics are not commands at all.

¹ "Had it power as it has manifest authority, it would absolutely govern the world." Butler, Sermons on Hum. Nat., ii, div. 3.

² "Conscience is thus seen to be a cognitive or intellectual power, not a form of feeling." Calderwood, Hand-book of Moral Phil., p. 65.

³ See Lorimer, Inst. of Law, chs iii, vi. Cf. Kant: "For how could any one believe that he has a source of universal law in himself, without principles *a priori*?" Phil. of Law (Hastie's trans.), p. 18.

⁴ "A command, then, is a signification of desire." Austin, Juris., p. 90.

⁵ Semple's trans. of Kant's Metaph. of Ethics, pp. 101, 103, quoted by Lorimer, Inst. of Law, pp. 192-193.

⁶ Lorimer, Inst. of Law, p. 3.

⁷ "Adventitious," because the view that God *commands* through conscience is not essential to the intuitional theory. See Calderwood, Hand-book of Mor. Phil., pt. v, ch. iv, p. 285; Taylor, "The Law of Nature," in *Annals of the American Academy*, April, 1891, p. 569.

V.

The natural law (*jus naturae, droit naturel, naturrecht*) of the practical sciences, in its broadest sense, is the whole code of moral duty so far as it is cognizable by the light of nature apart from revelation ;¹ but according to its narrower meaning, which is also the one dominant among modern moralists and legists, it is that portion of the laws of ethics, or moral laws, the enforcement of which is possible and fitting.

It is obvious that mere motions of thought and feeling are incapable of being exacted. "No external legislation," remarks Kant, "can cause one to adopt a particular intention or to propose to himself a certain purpose ; for this depends upon an internal condition or act of the mind."² Obviously, too, there are certain overt actions fully warranted by the laws of ethics which it would be harmful or highly inconvenient to attempt to realize by compulsion. If we abstract from the laws of ethics all that refers to the subjective elements of duty, such as the motive accepted, the intention cherished, *etc.*, so leaving only rules of external action ; if, further, we abstract from these all that relates to conduct unsuited to be made the subject of positive legislation, the residuum thus formed is natural law.³ In other words, natural law is so much of the law of ethics,⁴ from whatever standpoint regarded, as bears directly upon the social relations of men and may properly be actualized by force. I say "from whatever standpoint regarded," because it must not be supposed that

¹ Sidgwick, *Hist. of Ethics*, p. 160.

² The *Metaph. of Morals* (Hastie's trans. of Kant's *Phil. of Law*, p. 25).

³ According to Thomasius and Kant and their followers of the "negative school," this residuum comprises only the "perfect" or "determinate" obligations of justice or probity, as distinguished from the "imperfect" obligations of charity or benevolence. Lorimer, *Inst. of Law*, ch. xi ; Schopenhauer, *The World as Will and Idea* (trans. by Haldane and Kemp), pp. 444-445.

⁴ Holland (*Juris*, 1st. ed., p. 26) makes natural law part of the laws of public opinion (called by him "moral laws"). If this were correct, natural law would not have that independence of the will of man which its apostles especially claim for it ; and any appeal of the reformer from public opinion — the opinion *civium prava jubenitum* — to the "eternal" law of nature, would be an absurdity. See Taylor, *The Law of Nature*, *loc. cit.*

natural law can be founded only upon intuitionism. As being distinctly laws of outward action, Herbert Spencer's "deductions" from "the conditions of existence" and Bentham's "dictates of utility" require less limitation to convert them into natural law than Kant's "pure rational principles" or Lorimer's "dicta of our general and normal nature."¹

Without pushing the analysis further and encountering the inquiry: What morally-founded rules of external action are fitted to be enforced or ought to be transmuted into positive regulations? which is no other than the much-debated question of the true "limits of the state," — it has become evident that modern natural law, *per se*, is ideal enactment, or the positive law that *ought* to be; or, changing the expression, that it consists of ideal as opposed to real commands, and that consequently the so-called rights conceived to flow from it are ideal claims whose ultimate basis is deemed to be reason or the "very nature of things."

VI.

In his famous "Funeral Oration of Pericles," Thucydides speaks of the regard of the Athenians "for those unwritten laws which bring upon the transgressor of them the reprobation of the general sentiment."² This phrase of an immortal speech serves well to introduce to us the laws of public opinion or of society. Examples of these are found in the laws of etiquette that guide the world of fashion, in the laws of honor prevailing among the class called gentlemen, in the customs that regulated the life of primitive communities before the rise of the state and the organization of justice,³ and in that important aggregate of rules which obtains in the great society of civilized nations and is called international law.⁴

¹ Pollock, *Hist. of the Science of Pol.*, pp. 109–111. Spencer's leaning toward *naturrecht* is seen in *Pol. Insts.*, § 534, pp. 533 foll.

² Thucydides, ii, 37 (Jowett's trans.).

³ See Maine, *Village Communities*, p. 68 foll.; Letourneau, *Property*, pp. 225, 292–300.

⁴ "Obtains," *i. e.*, "is a matter of *fact* and *practice* as distinguished from the principles of justice which *ought* to regulate the mutual relations of nations in the opinion of this or that authority." Clarke, *Practical Juris.*, p. 177.

We have at last reached a kind of laws that are commands. Austin and Hearn, indeed, deny that they are such: Austin, mainly on the ground that a command cannot proceed from an indeterminate body, *i. e.*, one whose members are incapable of being precisely indicated by a specific or generic description;¹ Hearn, on the same ground and, further, because the laws of opinion "have not the essential characteristic of a command, a true sanction. No definite penalty is attached to the breaches of these customs, but only the vague sentiment of general disapprobation."² Now, although these laws emanate from an unorganized mass of individuals, having, as Bluntschli says,³ "no collective personality," and are enforced by unformulated penalties, they seem, nevertheless, to exhibit the capital marks of commands as these are stated in the Austinian analysis. They are the desires of the generality of certain groups of persons concerning the observance of acts and forbearances by members of those groups. These desires, though often receiving no formal promulgation, are manifested so clearly that the persons whom they affect are generally better acquainted with them than the average citizen is with the contents of large portions of the positive laws of his own commonwealth. Moreover, the sanctions of the laws of public opinion are inflicted by those whose desires have been contravened, for the purpose of enforcing obedience; and in point of effectiveness, as Locke⁴ has shown, they not seldom have a decided advantage over the sanctions annexed "to the laws of God and the magistrate."

Thus, while the law of the land and common morality both condemned duelling, the so-called law of honor strongly enjoined it in particular circumstances; and for many men the law of honor—in other words, of their particular class in society—had a stronger sanction than that of the commonwealth.⁵

¹ See *Juris.*, pp. 188, 199.

² *Legal Duties and Rights*, p. 7.

³ *The Theory of the State* (trans., 1892), p. 109.

⁴ *Essay on Human Understanding*, bk. ii, ch. 28, § 12.

⁵ Pollock, *Essays on Juris. and Ethics*, p. 311.

Hence we conclude that the indeterminate character of their sources and the vagueness of their penalties, which avail broadly to separate the laws of opinion or society from positive law, are insufficient to exclude them from the category of commands, or to render them incapable of generating a species of true rights that are usually designated as moral rights.

VII.

We have now completed our task of comparing and contrasting with other kinds of law the law of the lawyer and of the tribunal, or positive law, as defined by the English school of analytical jurisprudence. But, inasmuch as the doctrines of this school have recently been the object of a trenchant criticism that has considerably weakened the authority once accorded them, the value of the foregoing discussion will perhaps be increased by a brief justification of our initial assumption that all positive law is a command of the sovereign, *i.e.*, the regular, established ruling element of the state. It will doubtless be admitted that, in effect, this undertaking will be accomplished when it is shown that such definition is fairly applicable to that portion of positive law which has been molded upon preëxisting custom and is non-statutory, or, in other words, to "customary law."

There is a general consensus of opinion that no rules for human conduct are positive law — law *par excellence* — unless they possess a quality of necessity, or an obliging power derived from a coercing activity that is proper to political organization. Thus, Kant seems to teach that even the juridical rules of pure reason are inchoate or "provisory" merely, until they are realized through a civil union as public compulsory laws.¹

Law [says Falck], defined in the objective or universal sense of the term, designates the body of rules (*normæ*) that stand under the protection of the state, and they are at once distinguished in principle from other rules of conduct that stand either under merely ethical laws, or that may be observed from considerations of prudence, as well as from usages which are not obligatory.²

¹ See *Philosophy of Law* (trans. by Hastie), pp. 76-79, 164-165.

² *Outlines of Jurisprudence* (trans. by Hastie), p. 184.

And Ihering asserts, with still greater emphasis, that only those rules set up by the community deserve the name of law which have force, or since, as we have seen, the state alone possesses the monopoly of force, which have the power of the state behind them.¹

Even Puchta, who belongs to the class of jurists that go to the extreme in separating from the conception of law the notions of political organization and compulsion,² lays down that

right is embodied in rules of action ; it enjoins that something be done or left undone. The consciousness of right is, therefore, at the same time the will that what is conformable to right shall become a fact. . . . This will, however, needs an organ in order to be carried out in fact. And this organ in which the common will is embodied, and by which it receives its realization, is the power of government, through whose existence the people becomes a civil commonwealth or state.³

Now, it is just because customary law consists of rules that are protected, *i. e.*, applied and enforced by the sovereign of the state, or the sovereign's judicial and executive mandatories, and draws from this fact a measure, at least, of its necessity or obliging power, that such law falls under the category of law positive. To illustrate : The treatises of the "early English *prudentes*," headed by Glanville, are books of positive law, for the reason that they contain substantive rules and forms of practice that actually obtained under the royal judiciary system,⁴ "and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles."⁵ On the other hand, why do we deny the name of positive law to such important customary rules as the following : The King of

¹ Der Zweck im Recht, p. 318, quoted by Lightwood, Nature of Pos. Law, p. 319.

² See Savigny, System, § 52 ; Windscheid, Pandektenrecht, § 37 ; Trendelenburg, Naturrecht, p. 90.

³ Outlines of Jurisprudence (trans. by Hastie), p. 33.

⁴ See Clark, Practical Jurisprudence, pt. ii, ch. x ; Glanville, Tractatus de Legibus, prol. ; Bracton, De Legibus, *etc.*, lib. i, pref.

⁵ Blackstone, Commentaries, Int. § 3, p. 73.

England must assent to any bill passed by the two houses of Parliament ; British ministers must resign when they have ceased to command the confidence of the House of Commons ;¹ no President of the United States shall be reëlected more than once ; presidential electors shall not *really* elect ? Simply because these conventions are not under the immediate or mediate protection of the sovereign power as such, and no judicial or executive agency would take notice of their violation.

But, systematically to administer a rule by applying it and punishing infractions of it, is to command it. Thereby the desire for its observance is signified by a very "sufficient sign of the will,"² and the presence of the power and purpose of constraining obedience to it is put quite beyond doubt. "In principle," says Clark, "I agree with Austin that all law administered by the magistrates of a community has necessarily an imperative character."³

The difficulty in recognizing that "common law" (whether suggested by customary rules, *i. e.*, "the law of opinion," by the civil and canon law, or by pure considerations of utility⁴) is virtually a body of commands emanating from political authority, seems chiefly due to the remarkable way in which judges, aided by lawyers, have veiled their legislative activity under forms of words expressive only of the application of existent positive law.⁵ The marvel of the fiction is, not that it has misled the world at large, but that it has availed to hoodwink the professional legists themselves, the very class who originated and have since sedulously maintained it.

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¹ Regarding the whole mass of these constitutional understandings from a strictly legal standpoint, De Tocqueville declared that "the English constitution has no real existence" (*elle n'existe point*). *Cœuvres Complètes*, I, 166, 167.

² See Hobbes's definition of "civil law," *Leviathan* (Morley's Univ. Lib.), ch. xxvi, p. 123.

³ Clark, *Practical Jurisprudence*, p. 168.

⁴ As to the "suggesting causes" of judiciary law, see Austin, *Jurisprudence*, vol. ii, pp. 655, 656.

⁵ See Maine, *Ancient Law* (3d Am. ed.), pp. 29-32.